NO. 21737

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HONOLULU LUMBER CO., LTD., Appellant, vs. AMERICAN FACTORS, LTD., CITY MILL CO., LTD., HAWAII BUILDERS SUPPLY CO., LTD., ISLAND LUMBER CO., LTD., LEWERS & COOKE, LTD., MID PAC LUMBER CO., LTD., et al., Appellees.	NO. 21737

Appellant's Reply Brief

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APPELLANT'S REPLY BRIEF

Appellant, HONOLULU LUMBER CO., LTD., is in receipt of Appellees' Answering Brief and replies thereto briefly as follows.

Introductory

Appellant does not agree with Appellees' statement as to the proper question presented on this appeal (Appellees' Answering Brief p. 6) viz:

"The proper question on appeal is whether the District Court abused its discretion in dismissing the action based upon the entire record and circumstances of the action, including the failure of Appellant to attend its disposition"(underscoring added)

Appellant submits that the proper question on appeal is whether the District Court abused its discretion in dismissing

the action based upon the grounds raised by Appellees in their Motion to Dismiss, Affidavit and Statement of Reasons and Citation of Authorities filed on about August 25, 1966./ (347-356) These grounds were (1) the failure of plaintiff's president Mr. Preston Low (not of the plaintiff corporation as asserted by Appellees) to attend a noticed deposition and (2) the failure of plaintiff to obtain new local counsel in conformity with Rule I (e) of the Hawaii District Court. No other grounds were asserted by Appellees at this time nor does it appear from the record that any other grounds were asserted or considered by the District Court. Accordingly the Appellees are now belatedly attempting to assert new and additional grounds for support of the judgment which were not raised in the lower Court, to wit, Appellant's failure to prosecute the action based upon the entire record. This they cannot do for reasons hereinafter set forth. Appellant submits the lower Court abused its discretion in dismissing this action based upon the limited grounds set forth in their Motion to Dismiss.

Appellant has filed concurrently with this Answering Brief a Motion of Appellant to Strike Portions of Appellees' Answering Brief on the ground it has not complied with Rule 18 of this Court and specifically subsections 2(c), 2(e) 3 and 8 which require that all briefs, both of Appellant and Appellee, exhibit a clear statement of the points of law and facts to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point and, if the Appellant's statement of the

case is controverted, then with record references supporting each statement of fact or mention of trial proceedings.

I

Grounds Not Asserted in the Trial Court Cannot be Asserted for the First Time in the Appellate Court in Support of a Judgment.

Appellees in support of the Judgment of Dismissal urge this Court on appeal to consider the entire record below, when this point was not urged or considered in the lower Court as far as the record discloses. The only grounds for dismissal raised in the Court below were the two mentioned above, viz (1) Appellant wilfully failed to appear for a deposition and (2) Appellant failed to prosecute its action diligently because of its failure to name new local counsel in conformance with local Rule I(e). Everything else is irrelevant on this appeal.

> "Appellate Courts are especially careful to prevent injustice resulting from affirmations of a judgment upon a ground not presented to the trial Court and which might have been overturned by additional evidence had attention been directed to it"
>
> Uuku v. Kaio 20 Hawaii 567, 572.
>
> See also:
>
> Duarte v. Bank of Hawaii, CA 9 1961,287 F2d 51
>
> Baker v. Kaiser, 126 Fed 317, 319, 320

Southern Cotton Oil Co. v. Shelton, CA 4, 220 Fed. 247,256

A point not raised in the trial Court cannot be raised for the first time on appeal.

Missouri K & T Ry Co. v. Wilhoit, 160 Fed 440 (CA 8 1908)

And these additional authorities:

Peck v. Henrich, 167 US 624

Sacramento Suburban Fruit Lands Co. v. Melin
CA 9 1929, 36 F2d 907

Austad v. U.S.A., CA 9, 20, 876, decided November 16, 1967

In Peck, one ground advanced in support of the judgment was that plaintiff had not complied with the laws of Maryland. The Supreme Court in its opinion (Justice Gray) stated at p.628:

> "But the ground is not open to the defendant on the record. No such objection ..... was made at the trial".

In Sacramento, there had been a judgment for plaintiff and on appeal it for the first time asserted the Statute of Limitations. In refusing this assertion, the Court stated:

> ".... and now to affirm a judgment for a reason apparently never thought of by the lower Court or either party to the controversy would hardly be consistent with the spirit of modern judicial administration. Very generally is applied the rule that a theory accepted and acted upon by all in the trial Court cannot be repudiated in the Appellate Court."

And most recently in Austad decided by this Court in November, 1967 it was held in an action to foreclose a mortgage by the Small Business Administration that a letter not cited to the trial Court as part of their (defendants') affirmative defense for impairment of collateral could not be considered by the Appellate Court on appeal.

Appellant concludes from the foregoing that Appellees' attempt to base their Motion to Dismiss and the Judgment of Dismissal upon the entire record cannot be considered on appeal when it is now asserted for the first time, and that their Motion to Dismiss and the Judgment of Dismissal must be considered upon the limited grounds advanced in the lower Court viz (1) the failure of plaintiff's president Mr. Low to attend a noticed deposition, and (2) the failure of plaintiff to obtain new local counsel in conformity with local Rule I(e).

II

The Dismissal on the Ground of a Failure to Attend a Noticed Deposition Under the Circumstances Constituted Judicial Error.

Plaintiff's president Mr. Low was noticedfor a deposition on June 28, 1966 at the offices of defendants' counsel in Honolulu.[1/] Mr. Low was in Honolulu on June 20, 1966 and asked plaintiff's local counsel of record to obtain a continuance as he was on his way to Hongkong on a business trip and could not attend a deposition in Honolulu on this date. Plaintiff's local counsel then

1/ This was the first and only Notice of taking of deposition served on Mr. Low.

wrote counsel for defendants setting forth the circumstances and asking for a continuance of the deposition and also asking for a reply to his letter. Defendants did not reply to the letter. Plaintiff assumed that a continuance would be granted; at the least it was assumed defendants did not object to not holding the deposition on the date set in the written notice. It is to be noted that in the affidavit of E. Gunner Schull in support of the Motion to Dismiss (351-353) it is not alleged that defendants were present themselves at the noticed place for the deposition; only that plaintiff (i.e. plaintiff's president Mr. Low) was not present at the time and place specified. For all that appears from the record defendants likewise were not present at the time and place specified and apparently had abandoned the idea of taking Mr. Low's deposition.

Accordingly Appellant submits that under the circumstances plaintiff's president Mr. Low did not wilfully fail to appear for his deposition as provided by Rule 37(d) of the Federal Rules of Civil Procedure.

The case of Fischer v. Dover Steamship Co. CA 2 1954, 218 F2d 682 cited by Appellees in their brief at page 15 is clearly distinguishable on the facts. There, plaintiff failed to present himself for deposition after four and one-half months (as contrasted to only two months here), the defendant moved to dismiss, the Court ordered a dismissal unless plaintiff appeared for his deposition within 60 days and plaintiff then failed to appear

within the additional 60 days. In upholding the dismissal the Appellate Court noted that the plaintiff offered no plausible and specific explanation for his failure to attend the deposition, whereas it is submitted plaintiff here has offered such an explanation, viz, local counsel wrote a letter requesting a continuance and a reply thereto and defendants made no reply.

III

The Dismissal on the Ground of a Failure to Prosecute Under the Circumstances Constituted Judicial Error.

The only basis for dismissing the action on the ground of a failure to prosecute must in the last analysis be based on Appellant's failure to secure the assistance of new local counsel, which in turn was made necessary by the trial Court's approval of an ex parte order permitting plaintiff's local counsel of record to withdraw without any notice to plaintiff and without any evidence on the record justifying such withdrawal.

Appellees argue (Answering Brief, p. 17) that Mr. Naito had withdrawn from private practice to become a full time employee of the State of Hawaii, and therefore there was a good reason for the Court in permitting him to withdraw as local counsel of record. The reason however should have been set forth in an affidavit attached to the Motion and not by an unsworn memorandum.

Switzer Brothers, Inc. v. Byrne CA 6th, 1957, 242 F2d 909

Rule 6(d), Federal Rules of Civil Procedure

2 Moore's Fed. Practice, Section 6.11, 1495

Even assuming the reason for Mr. Naito's withdrawal had been properly presented there is no reason offered or even suggested in the record why the Court permitted Mr. Shim and Mr. Oki to withdraw. They were Mr. Naito's partners and also plaintiff's local counsel of record (260-261, 342-346). Furthermore Appellees in their Answering Brief have not commented upon or attempted to distinguish the authorities cited at pages 14 to 16 of Appellant's Opening Brief, and specifically the Laskowitz case (Laskowitz v. Shellenberger [S.D. Calif. 1952] 107 F Supp 397) where it was held that an attempted unilateral withdrawal of an attorney for a corporate party was not proper; such withdrawal could only be effected by a substitution of attorneys approved by the Court. This was not done in the instant case and in itself constituted prejudicial error since it left the plaintiff, an insolvent corporation, without local counsel and without the ability to secure new local counsel except on a contingency basis due to its lack of resources and the complexities and expense involved in anti-trust litigation.

If this ex parte order was improperly granted by the trial Court then Appellant's subsequent conduct in not attending the deposition and the hearings on Appellees' Motion to Dismiss may be excused, at least until it was able to obtain new local counsel or its former local counsel was re-instated.

Finally Appellees argue that Appellant's objection to the withdrawal of its local counsel comes too late (Answering Brief pp. 16-18). In answer to this, Appellant argues that it made

every effort to secure new local counsel in compliance with local Rule I(e), during the period June 22, 1966, the date of withdrawal of Messrs. Maito, Shim and Oki, to at least September 23, 1966 (affidavits of Arthur H. Tibbits 368-370, 375-387 and 405-417) and only filed its Motion to Vacate Withdrawal of Counsel on September 23, 1966 (affidavit of Arthur H. Tibbits 405-417) when it was unable to obtain new local counsel due to lack of funds. Under these circumstances Appellant submits its Motion to Vacate Withdrawal of Counsel filed approximately three months after the said withdrawal did not come too late.

Conclusion

In conclusion Appellant submits that the prejudicial error in this action was occasioned by the District Court in permitting its local counsel to withdraw without proper notice and without good cause shown by affidavit as required by the Federal Rules of Civil Procedure, and that the Dismissal of this action on the limited grounds of a failure to attend a noticed deposition and a failure to obtain new local counsel and to prosecute constituted judicial error.

Appellant sincerely urges this Honorable Court to rectify this error of the District Court by reversing the Judgment of Dismissal, ordering the re-instatement of Appellant's local counsel of record Messrs Naito, Shim and Oki (or alternatively Messrs Shim and Oki) and ordering the action to proceed to trial.

Dated at San Francisco, California, this 5th day of February, 1968.

Respectfully submitted,

Arthur H. Tibbits
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief of appellant is in full compliant with those Rules.

Arthur H. Tibbits

AFFIDAVIT OF MAILING

State of California)
City and County of San Francisco) ss.

Arthur H. Tibbits, being first duly sworn, deposes and says:

I am an active member of the State Bar of California and my business address is 55 New Montgomery Street, San Francisco, California; I served a copy of the attached Appellant's Reply Brief by placing a copy in an envelope addressed to the following persons at their office addresses as below:

Gilbert E. Cox, Esq.
First National Bank Building
Honolulu, Hawaii

Ralph T. Yamaguchi, Esq.
Room 552, Alexander Young Bldg.
Honolulu, Hawaii

George L. T. Kerr, Esq.
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Alvin T. Shim, Yukio Naito and
Eichi Oki, Attorneys at Law
446 Honolulu Merchandise Mart
Building
Honolulu, Hawaii

The envelopes were then sealed and postage fully prepaid and on February 5, 1968 were deposited in the United States mail at San Francisco, California.

Arthur H. Tibbits

Subscribed and sworn to before me
this 5th day of February, 1968.

Notary Public

EDNA McGUFFIN
My Commission Expires Jan. 9, 1969